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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1974

No. 74-669

KELLY DEAN SPARKS,
Petitioner,

-vs-

STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RUFUS L. EDMISTEN
Attorney General of
North Carolina

THOMAS B. WOOD
Assistant Attorney General

Counsel for the State of
North Carolina, Respondent

Department of Justice
Post Office Box 25201
Raleigh, North Carolina 27611
Telephone (919) 829-3316

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OPINION BELOW

From a verdict of guilty of first degree murder and the imposition of a sentence of death entered by the Guilford County Superior Court in October of 1973, the defendant perfected a direct appeal to the North Carolina Supreme Court. That Court found no error, and upheld the sentence of the Superior Court. The opinion of the Supreme Court of North Carolina is found in its reports at 285 N.C. 631.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

I.

WHETHER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES THAT A TRANSCRIPT BE MADE OF THE *VOIR DIRE* EXAMINATION OF PROSPECTIVE TRIAL JURORS IN A CAPITAL CASE, SO AS TO ASSURE A RECORD OF SUFFICIENT COMPLETENESS TO PRESERVE THE DEFENDANT'S RIGHTS AGAINST UNCONSTUTUTIONAL METHODS OF JURY SELECTION, AS MANDATED BY *WITHERSPOON v. ILLINOIS*, 391 U.S. 510 (1968).

II.

WHETHER THE RIGHTS OF A CRIMINAL DEFENDANT TO BE PRESUMED INNOCENT UNTIL PROVEN GUILTY AND TO HAVE THE BURDEN UPON THE STATE TO PROVE ALL ELEMENTS OF THE CASE BEYOND A REASONABLE DOUBT ARE VIOLATED BY INSTRUCTIONS THAT (a) A KILLING IS PRESUMPTIVELY UNLAWFUL AND DONE WITH MALICE WHEN A DEADLY WEAPON IS INTENTIONALLY USED, AND (b) THE BURDEN OF PROOF IS ON THE DEFENDANT TO SATISFY THE JURY THAT THERE WAS NO MALICE ON HIS PART, SO AS TO REDUCE THE CRIME TO VOLUNTARY MANSLAUGHTER.

III.

WHETHER IMPOSITION AND CARRYING OUT OF A SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA , VIOLATES THE EIGHTH AMENDMENT OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. CONSTITUTION

ARTICLE 4, SECTION 4.

"The United States shall guarantee to every state in this union a republican form of government . . . ."

("Republic, commonwealth, a popular state or government; or a nation where the people have the government in their own hands." Vol. III ENCYCLOPEDIA BRITANNICA A DICTIONARY OF ARTS AND SCIENCES, 548, 1st Ed. (1771))

("republic, n. number 1. A state in which the supreme power rests in the body of citizens entitled to vote and is exercised by representatives chosen . . . by them." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Unabridged, 1218 (1966))

AMENDMENT V.

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

AMENDMENT VIII.

"Excessive bail shall not be required, nor excessive

fines imposed, nor cruel and unusual punishments inflicted."

AMENDMENT X.

"The powers not delegated to the U.S. by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

AMENDMENT XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GENERAL STATUTES OF NORTH CAROLINA

N.C.G.S. 14-17

Murder in the first and second degree defined; punishment. - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: *Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.** All other kinds of murder shall be deemed

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* Subsequent to this Court's decision in *Furman*, the North Carolina Supreme Court in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (1973) declared the portions set forth in italics above unconstitutional.

murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison.

STATEMENT OF CASE

The petitioner was tried upon a bill of indictment charging him with the murder of George L. Lashley, the Chief of Police of Gibsonville, North Carolina. He was tried by a Judge and a jury in the Guilford County Superior Court at Greensboro, North Carolina, during the October 29, 1973 session of Court. The jury found the defendant guilty of murder in the first degree and the Superior Court entered its judgment condemning the defendant to death. The judgment of the lower court was affirmed by the Supreme Court of North Carolina on appeal.

STATEMENT OF FACTS

The respondent, State of North Carolina, agrees with those facts pertinent to this petitioner's rights to be adjudicated in the Supreme Court of the United States as set forth in that opinion of the North Carolina Supreme Court which is appended as Appendix "A" to the petitioner's Petition for Writ of Certiorari and heretofore filed in this Court.

ARGUMENT

I

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES REQUIRES THAT A TRANSCRIPT BE MADE OF THE *VOIR DIRE* EXAMINATION OF PROSPECTIVE TRIAL JURORS IN A CAPITAL CASE, SO AS TO ASSURE A RECORD OF

SUFFICIENT COMPLETENESS TO PRESERVE THE DEFENDANT'S RIGHTS AGAINST UNCONSTITUTIONAL METHODS OF JURY SELECTION AS MANDATED BY *WITHERSPOON V. ILLINOIS*, 391 U.S. 510 (1968).

Constitutional due process does not require the State to furnish a transcript of the *voir dire* examination of the jury when defendant has not requested such a transcript.

Petitioner Sparks claims that constitutional due process requires that the State furnish a transcript of the *voir dire* examination of prospective trial jurors in a capital case even in the absence of a request. This question is not properly before the Court, because, for all that appears in the record, the question is raised for the first time in the Petition for Certiorari. The question was neither raised in nor passed upon by the Supreme Court of North Carolina, nor does it appear in the record that a request was made to the trial court that a transcript be made and made available to the petitioner.

As this Court said in *Williams v. Georgia*, 349 U.S. 375, 382 (1954),

> "A state procedural rule which forbids the raising of a federal question at late stages of the case, or by any other than a prescribed method, has been recognized as a valid exercise of State power."

See also, *Chambers v. Mississippi*, 410 U.S. 284, at 308 et. seq. (1973) (opinion of Rehnquist, J.).

The rule of appellate practice in North Carolina is to the effect that the

> "Supreme Court will not decide questions which have not been presented or adjudicated in the court below, especially questions relating to the constitutionality of a statute or an act of Congress". 1 *Strong's, N. C. Index 2d*, p. 106 (1967), and cases there cited.

There is a second reason that this Court should not grant certiorari to question No. 1 raised by the petitioner, Sparks,

as to the requirement of a transcript of the *voir dire* examination of jurors. It is not the practice in North Carolina to make a transcript of the *voir dire* examination of jurors unless the transcript is requested by the defendant. But if such transcript is requested, it is granted as a matter of course. *State v. Fowler*, 285 N.C. 90, 103-107 (1974).

The Supreme Court of North Carolina in the *Fowler* case said, 285 N. C. at 107:

> "It is the primary duty of defense counsel to prepare and docket a true and adequate transcript of the record in the case on appeal in a criminal case. *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. Roux*, 263 N.C. 149, 139 S.E. 2d 189 (1964); G.S. 15-180; G.S. 1-282. It is also the duty of the solicitor to scrutinize the copy that the appellant serves upon him. If it contains errors or ommissions, it is the solicitor's responsibility to file exceptions or countercase. *State v. Fox, supra*. If, as in the present, defense counsel desires to take exception to the act of the Court in excusing a prospective juror, he should either enter into a stipulation with the State setting out in detail the reason for excusing the juror, or he should include a transcript of the *voir dire* examination as to that juror in the case on appeal. He should not take exception to his own failure to prepare and docket a true and adequate transcript of the record in the case on appeal. Such action is not approved."

The principle underlying the right to counsel case, *Gideon v. Wainwright*, 372 U.S. 335 (1963), is that the criminal defendant should have at his disposal a trained advocate who knows the law and is able to adequately preserve his rights. All that has happened in this case is that Sparks' counsel failed to request that a transcript of the *voir dire* examination be made and failed to put a transcript of that *voir dire* examination into the record. In no sense of the word has the State of North Carolina *denied* this petitioner a transcript of the *voir dire* examination of jurors in his case in order that he might preserve his rights under *Witherspoon v. Illinois, supra*.

II

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE RIGHTS OF A CRIMINAL DEFENDANT TO BE PRESUMED INNOCENT UNTIL PROVEN GUILTY AND TO HAVE THE BURDEN UPON THE STATE TO PROVE ALL ELEMENTS OF THE CASE BEYOND A REASONABLE DOUBT ARE VIOLATED BY INSTRUCTIONS THAT (a) A KILLING IS PRESUMPTIVELY UNLAWFUL AND DONE WITH MALICE WHEN A DEADLY WEAPON IS INTENTIONALLY USED, AND (b) THE BURDEN OF PROOF IS ON THE DEFENDANT TO SATISFY THE JURY THAT THERE WAS NO MALICE ON HIS PART, SO AS TO REDUCE THE CRIME TO VOLUNTARY MANSLAUGHTER.

The State of North Carolina will substantially ratify the arguments presented by it in the Supreme Court of North Carolina and as contained in its brief filed in that Court. In its brief, the State advocated the position that the North Carolina rule substantially places the burden of proving the existence of malice upon the State and absolves the State of this burden only in extreme circumstances. Thus, the State could prove that a defendant: (1) used a deadly weapon; (2) pointed at the deceased; (3) fired the fatal shot, and still it would be charged with the burden of proving that such acts were accomplished intentionally. In effect, therefore, it would not be until the state also proved that the defendant intentionally used a deadly weapon that the burden of proof of a lack of malice toward the deceased would arise and shift to the defendant. The burden of such proof remains with the State and shifts only after additional proof of an intentional killing is established. It must be advocated that the shifting of the burden of proof to the defendant to disprove that he maliciously killed his victim, when these extreme circumstances are all proven, would be desirable. Especially would this be so when it is considered that evidence in mitigation would be more readily available to the defendant. See *State v. Drake*, 8 N.C. App. 214, 174 S.E. 2d 132 (1970); *State v. Currie*, 7 N.C. App. 439, 173 S.E. 2d 49 (1970); *State v. Sanders*,

276 N.C. 598, 174 S.E. 2d 487 (1970).

It is therefore, strongly argued by the State of North Carolina that its rule with regard to the burden of proof in a homicide case does not run counter to the holdings of *Re Winship*, 397 U.S. 358 (1970) and *Speiser v. Randall*, 357 U.S. 513 (1958). Rather, such rule is consonant with these holdings considering the fact that the initial burden of proof in such cases remains with the State.

III

THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER IMPOSITION AND CARRYING OUT OF A SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH AMENDMENT OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. *The mere existence of prosecutorial discretion, plea bargaining, the absolute requirement for the imposition of the death penalty upon capital offense convictions, and executive clemency do not bring a mandatory death penalty statute within the prohibitions of the Furman decision.*

In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed. 2d 346, the Supreme Court of the United States held that the Eighth and Fourteenth Amendments to the Constitution of the United States forbid a state to inflict the penalty of death if, under the law of the state, either the jury or the judge is permitted, as a matter of discretion to choose between the imposition of the death penalty and the imposition of the penalty of imprisonment. The North Carolina Supreme Court case of *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19, 23 (1973) was decided by that Court with knowledge of this Court's holding in *Furman* and decreed that the portion

of N.C.G.S. 14-17 which allows the jury the discretion (upon their guilty verdict of first degree murder) to recommend life imprisonment, invalidated only the discretionary portion of the statute and that (prospectively from the January 18, 1973 date of the *Waddell* decision) the North Carolina law would require that the court must pronounce a sentence of death upon every guilty verdict for any of the four capital offenses in North Carolina. The *Waddell* case was tried in the Superior Court of North Carolina prior to the *Furman* decision, and Waddell was sentenced to death. It was the first case to reach the North Carolina Supreme Court subsequent to *Furman*. The North Carolina Supreme Court then applied this court's *Furman* decision to Waddell and ordered his death sentence vacated and that he be sentenced to life imprisonment, 282 N.C. at 447 (North Carolina Supreme Court Reports).

The North Carolina Supreme Court further declared unconstitutional the following provisions of North Carolina General Statutes 14-17 (murder); 14-21 (rape); 14-52 (burglary); and 14-58 (arson):

> "Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

For the reasons set forth in its opinion, our court demonstrated that the proviso clause was clearly severable from the clause setting forth the punishment as established by the North Carolina General Assembly. See *Waddell*, 282 N.C. at pages 441-445.

The *Waddell* decision thus left death as the only permissible punishment in North Carolina for the crimes of first degree murder, rape, burglary and arson. The North Carolina Constitution of 1970 specifically provided for such punishment.

Our court in *Waddell* went even further to protect the constitutional rights of its citizens against *ex post facto* laws, for at 282 N.C. at page 446, of that opinion it *held*:

> "North Carolina's mandatory death penalty for rape, murder in the first degree, burglary in the first degree and arson may not be constitutionally applied to any offense committed *prior to the date of this decision but shall be applied to any offense committed after such date*. (Emphasis added)."

The North Carolina General Assembly has consistently decreed the death penalty for first degree murder and rape for nearly two hundred years and has recently reaffirmed that policy.

In 1778, the State of North Carolina enacted what is now codified as G.S. 4-1 which states:

> "All such parts of the common law as were heretofore in force and use within this State, or so much of the Common Law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State."

As both murder and rape were capital felonies under the common law, they became so in North Carolina in 1778. Thus death has been the punishment for murder in the first degree and rape in North Carolina for nearly two hundred years. *Waddell, supra*, at 441.

It was in 1949 that our present statutes providing for punishment in capital cases were amended. Prior to that time the punishment was death.

The amendments to each of our capital punishment statutes added the proviso which (1) empowered the *jury in its discretion* to recommend and thus to fix the punishment at life imprisonment, and (2) required the trial judge to so instruct the jury. *Waddell, supra*, at 441.

The question which the North Carolina Supreme Court was confronted with was:

> "Does the remainder of G.S. 14-21 stand alone with death as the mandatory punishment for rape; or, is the proviso such a constituent and inherent part of a single statutory scheme of punishment that it is inseverable and the entire statute must fall?"

It was the sole duty and responsibility of our Supreme Court to answer that question. Justice Lake, speaking in a concurring opinion in *Waddell*, summed up that duty as concisely as can be done at 282 N.C. 448 and 449. He said:

> "The Supreme Court of the United States being the higher authority on the validity of judgments under the Consitution of the United States, its mandates, issued in reliance upon *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346, vacating the death sentences previously affirmed by this Court in the five cases cited in the opinion of Justice Huskins, became the law of those five cases. Under the compulsion of those mandates, this Court remanded those cases to the respective superior courts for the imposition of sentences of life imprisonment.
>
> The present case, on the contrary, is before us for the first time. In it we have no mandate from the Supreme Court of the United States vacating the death sentence imposed upon this defendant. In the absence thereof, it is our duty, not that of the Legislature, to determine just what the United States Supreme Court decided in *Furman v. Georgia, supra*, and to determine the present state of the law of North Carolina with reference to punishment for the crime of rape in the light of that decision.
>
> Only this Court can determine whether any portion of G.S. 14-21 is the law of North Carolina today and, if so, which portion. The Legislature, now in session, cannot make that determination. The Legislature can determine what the law of this State ought to be and shall be in the future. That is policy making and that is the Legislature's prerogative and responsibility. It is for us, and for us alone, to determine what part of G.S. 14-21, if any, is the law of North Carolina today and determinative of the validity of the sentence from which this defendant appeals. That is not policy making but the interpretation of the statute - an exercise of the judicial function which we may not abdicate or assign to the Legislature. Constitution of North Carolina, Art. 1, §6; Art. IV, §1.

> It is quite clear, as the opinion of Justice Huskins plainly states, that it is for the Legislature, not for this Court, to determine the policy of this State as to what acts shall be deemed crimes and as to the punishment therefor; that is, to determine what punishment ought to be and shall be imposed for the offense of rape, hereinafter committed. Constitution of North Carolina, Art. I §6; Art. II, §1; Art. XI, §2. But the Legislature has spoken in G.S. 14-21 and, until it speaks again, it is the duty of this Court to determine what, if anything, remains of its pronouncement in G.S. 14-21 after the decision in *Furman v. Georgia, supra*. No officer or agency, save this Court, can make that determination.
>
> ...Whether a statute is separable or inseparable is a question of statutory interpretation. It is well settled that the interpretation of a state statute is a question to be determined by the supreme court of the state. The Supreme Court of the United States has repeatedly accepted as binding upon it the interpretation placed upon state statutes by the highest courts of such states.
>
> Thus, the Supreme Court of the United States has not said, and may not properly determine that G.S. 14-21 is or is not separable. What it has said in *Furman v. Georgia, supra*, is that the discretion which the proviso in G.S. 14-21 undertook to vest in North Carolina juries cannot be conferred upon them consistently with the Fourteenth Amendment. It having so held, it is now the prerogative and duty

of this Court, and this Court alone, to determine whether the proviso is severable from the original statute unto which the proviso was attached by amendment in 1949. Thus, it is the date of the decision of that question by this Court – today – not the date of the decision in *Furman v. Georgia, supra*, which fixes the offenses of rape for which a death sentence may be imposed without running afoul of the *ex post facto* principle."

The Supreme Court of North Carolina answered the question it was confronted with in *Waddell* as follows:

"The original portion of G.S. 14-21 with its mandatory death penalty for rape stood alone and was given full effect by the courts of this State for a century prior to the enactment of the 1949 proviso. Grammatically, as well as historically, the two portions of the statute are distinct and separate and the constitutional invalidity of the added portion will not destroy the part which was in existence prior to the enactment of the unconstitutional portion. (282 N.C. at 442-443).

* * * *

In light of the authorities cited, we hold that the unconstitutional proviso in G.S. 14-21 is severable and the remainder of the statute with death as the mandatory punishment for rape remains in full force and effect. (282 N.C. at 444-445).

* * * *

We recognize that the Legislature, not the courts, decides public policy, responds to public opinion and, by legislative enactment, reflects society's standards. The matter of retention, modification or abolition of the death penalty is a question for the law-making authorities rather than the courts. In view of the decision in *Furman*,

the Legislature may wish to delete the unconstitutional proviso from G.S. 14-21 (rape), G.S. 14-17 (murder), G.S. 14-52 (burglary), and G.S. 14-58 (arson); or it may wish to rewrite these statutes altogether to give expression to what it conceives to be the public will. Meanwhile, we hold that the effect of the *Furman* decision upon the law of North Carolina concerning the punishment for rape, murder in the first degree, arson and burglary in the first degree is this: Upon the trial of any defendant so charged, the trial judge may not instruct the jury that it may in its discretion add to its verdict of guilty a recommendation that defendant be sentenced to life imprisonment. The trial judge should charge on the constituent elements of the offense set out in the bill of indictment and instruct the jury under what circumstances a verdict of guilty or not guilty should be returned. Upon the return of a verdict of guilty of any such offense, the court must pronounce a sentence of death. The punishment to be imposed for these capital felonies is no longer a discretionary question for the jury and therefore no longer a proper subject for an instruction by the judge. (282 N.C. at 445).

In the application of its decision in *Waddell*, the North Carolina Supreme Court directed that the death penalty could not be imposed on any criminal whether tried or not for any capital offense committed at or before the time of the finding of its decision on January 18, 1973. (282 N.C. at 446). Compare *Johnson v. New Jersey*, 384 U.S. 719 (1966).

In *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974), we have the first case to reach the Supreme Court of North Carolina for a crime committed subsequent to the *Waddell* decision. In the *Jarrette* case, the North Carolina Supreme Court was requested to reconsider its decision in *Waddell*. The court did and reaffirmed its decision, *id.* at page 654.

The Court noted in *Jarrette* at pages 654-655:

"The determination of what the statutes of this State mean, with reference to the punishment to be imposed for criminal offenses, is a question of State law and the determination thereof by this Court is authoritative. It is not a Federal question. *Adderly v. Florida*, 385 U.S. 39 . . . reh.den., 385 U.S. 1020; *Shuttlesworth v. Birmingham*, 382 U.S. 87. . . .

* * * *

The contention of (Jarrette) is that a state statute, which makes it mandatory that a defendant, fairly and lawfully convicted of first degree murder or of rape, be sentenced to death, violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

* * * *

This is, of course, a Federal question and our determination of it is subject to review by the Supreme Court of the United States, but we must make the initial determination and must do so in the light of decisions heretofore rendered by that Court."

The major questions that the defendant recites in his petition regarding the prohibitions against the existence of prosecutorial discretion, plea bargaining, jury discretion, arbitrariness of a mandatory death penalty, and executive clemency are, also, very clearly answered in the *Jarrette* case.

As our court noted in the *Jarrette* case, 284 N.C. at 656:

> "Although the mere statement of these contentions, in clear and simple terms, seems sufficient to show their lack of substance, the seriousness with which they are advanced impels us to take note of them briefly."

The court then addressed itself to each of the contentions of Jarrette and its answers are set forth at 284 N.C. 656-666.

These are found in Petitioner Jarrette's petition (No. 73-6877), Appendix "A", 202 S.E. 2d 721 at pages 741-747 which has heretofore been filed in this court.

The respondent, State of North Carolina, is unable, after research, to improve upon the reasoning and line of authorities set forth in the *Jarrette* opinion as noted immediately above. Accordingly, respondent adopts that reasoning and line of authorities as its response in this Court to the petitioners' contentions.

Respondent stipulates that the Governor of North Carolina does have the power to grant pardons and clemency to prisoners in the State's prison, and affirmatively shows that this Court has held this to be an unreviewable power in the hands of the chief executive. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

Respondent stipulates that its District Attorneys have the duty to exercise their respective judgments as to what crime the State's evidence warrants prosecuting, but shows unto the Court this judgment is a prerequisite to the carrying out of his constitutional duty, but the District Attorney's judgment must be exercised in accordance with law.

Respondent stipulates that its juries must exercise their respective judgments as to what crime, if any, the State's evidence has convinced them beyond a reasonable doubt an accused has committed. The respondent shows unto the Court that this exercise of judgment is a prerequisite to the performance of its constitutional duty and must be done in accordance with law.

B. *The mandatory death penalty is neither arbitrary nor inconsistent with contemporary standards of decency.*

The proscription against cruel and unusual punishment is applicable to the States through the due process clause of the Fourteenth Amendment. *Powell v. Texas*, 392 U.S. 514 (1968); *Robinson v. California*, 370 U.S. 660 (1962). The North Carolina Supreme Court so held in *State v. Waddell*, 282 N.C. 431 at page 436, 194 S.E. 2d 19, 23 (1973).

Since the beginning of the United States as a separate nation two hundred years ago, death sentences have been administered by both the Federal and State governments for a variety of crimes. As the North Carolina Supreme Court noted in *Waddell, id.* at page 435:

> "Prior to the decision in *Furman v. Georgia* the United States Supreme Court implicitly approved or, albeit in dictum, expressly upheld the constitutionality of capital punishment in many cases, including *Wilkerson v. Utah*, 99 U.S. 130, 25 L.Ed. 345 (1879); *In re Kemmler*, 136 U.S. 436, 34 L.Ed. 519, 10 S.Ct. 930 (1890); *Weems v. United States*, 217 U.S. 349, 54 L.Ed. 793, 30 S.Ct. 544 (1910); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 91 L.Ed. 422, 67 S.Ct. 374 (1947); *Trop v. Dulles*, 356 U.S. 86, 2 L.Ed. 2d 630, 78 S.Ct. 590 (1958); *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968); *McGautha v. California*, 402 U.S. 183, 28 L.Ed. 2d 711, 91 S.Ct. 1454 (1971). Thus, since the ratification of the Eighth Amendment one hundred eighty-one years ago, no decision of the United States Supreme Court prior to *Furman* casts the slightest doubt on the constitutionality of capital punishment."

Nor is there reason to believe this Court now considers capital punishment to be cruel and unusual punishment, *per se*, within the meaning of the eighth amendment. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Justices of this Court went to some length to explain that they did not reach that question.

As the North Carolina Supreme Court noted in the *Waddell* case:

> "Mr. Justice Douglas . . . wrote . . . Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach . . . (282 N.C. at 437).
>
> Mr. Justice Stewart . . . expressed his views as follows . . . The constitutionality of capital punishment in the abstract is not . . . before us in (Furman) . . . (282 N.C. at p. 437-438).
>
> Mr. Justice White . . . depicts his views. (thusly) . . . 'I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment . . . '(282 N.C. at 438).
>
> Four members of the (U.S. Supreme) court dissented (in Furman). The position of the four dissenters is best summed up by Chief Justice Burger as follows: . . . . Today the Court has not ruled that capital punishment is *per se* violative of the Eighth Amendment; nor has it ruled that punishment is barred for any particular class or classes of crimes . . . (282 N.C. at 439)."

Thus, our court having to apply this Court's *Furman* decision in *Waddell*, at 282 N.C. 439, held:

> "The foregoing quotations from the various separate opinions in *Furman* compel the conclusion that capital punishment has not been declared unconstitutional *per se*. Rather, the *Furman* decision holds that the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion."

There can be no dispute that the federal government has no powers beyond those delegated to it in the Constitution. That is, it has only limited sovereignty.

This being so, then where does the remainder of the sovereign power lie? If the answer be "the people" then who has "the people" deemed should exercise the remaining powers of their sovereignty?

The State contends the answer is to be found in the tenth amendment to the Constitution.

It is the State's contention that two of the incidents of those sovereign powers reserved to the States is the power to define criminal conduct and provide for the punishment therefor within the State's territory, limited only by the prohibition against cruel and unusual punishment contained in the eighth amendment.

Roscoe Pound in Volume II, *Jurisprudence*, part 12, *Law and the State* at page 317 states:

> "As a legal conception, sovereignty seems to mean the aggregate of powers possessed by the ruler or the ruling organs of a politically organized society. Internal sovereignty, then, is the aggregate of the powers of internal control possessed by the ruling organs of the society by virtue of which it is paramount over all action within. According to Sir Frederick Pollock it is the capacity 'of making, declaring and amending the law . . . without reference to any other authority and without any legal limit to its own power.'

* * * *

But the idea of sovereignty begins with Bodin. He defined the state (*republica*) as an association governed by the highest power (*suprema majestas*) as the 'highest power over citizens and subjects, free from laws' (*legibus soluta*). Its chief characteristic was the power to give law to all citizens.

* * * *

At common law, social interests were largely secured by a doctrine that the king was *parens patriae*, father of his country. That is, he was the guardian of public and social interests of all kinds and hence his courts of law and of equity had a general superintendence of all matters where 'public rights' (i.e. social interests or public interests) might be jeopardized.

Criminal law is the primary resource of the legal order for securing social interests immediately as

> such. At common law, prosecutions were in the name of the king and under the control of the Attorney General to the extent of his authority to enter *nolle prosequi* . . . (Pound. III *Jurisprudence*, Part 14, Scope, *Subject Matter of Law*, at p. 264."

Pound further discusses *Interests* in Part 14 of Volume III, *Jurisprudence* at page 238, *et. seq.* He specifically discusses the interests of the state as a legal entity.

> 1. *Interests of the state as a juristic person.*
>
> No small part of international law is taken up with the interests of states which international law should secure against infringement by other states. Thus it has usually been said that the absolute or natural rights of states, meaning the interests which it is held should be secured, are: (1) The right of self-preservation and independence. This is analogous to the so-called natural rights of physical integrity and personal liberty ascribed to the individual. It is analogous to an individual interest of personality. (and) (2) The right of exclusive legislation and jurisdiction within its territory. This, too, is an interest of personality. It is an interest akin to the interest of the individual in being allowed to manage his own affairs freely. Juristically, it is secured as a liberty...."

As the tenth amendment is directed toward maintaining the class of interests referred to by Pound as "public interests", *id.* (Vol. III at page 235), the United States of America is equally obligated to protect the State of North Carolina's exercise of its sovereign rights as it is to protect any other constitutionally protected right whether it be individual or State.

This Court, even if it desired to do so, would not abrogate a constitutionally guaranteed right of a State nor would it abrogate such rights of an individual. Thus

"contemporary standards" of "society" cannot be a proper basis for abolishing the death penalty under the Eighth Amendment any more than the "contemporary standards" of the McCarthy era could abolish the rights guaranteed to the individual under the Fifth Amendment to the Constitution.

Only by the exercise of the sovereign power of the State through its legislature should the punishment for murder or rape be lessened in North Carolina.

No other body of men and women on the face of this earth should be lawfully entitled to exercise that governmental power other than the people of North Carolina, either directly in revolution or by vote on a new constitution.

In summarizing its argument, the State of North Carolina would aver that the petitioner is effectively requesting that this court construe the Eighth Amendment in such a manner as to nullify express provisions of the Fifth and Fourteenth Amendments, and deny to the states the power to prescribe and impose appropriate punishment for capital crimes. The petitioner is therefore requesting that this court nullify in reality, the power of the people as a republic, acting through their elected representatives, to establish appropriate punishments for crime. The respondent contends that to do this, the Court would be placing an unwarranted restriction on Article IV of the Tenth Amendment to the Constitution of the United States as well as nullifying express provisions of the Fifth and Fourteenth Amendments.

The lawmakers and law enforcers have an affirmative constitutional duty to ensure domestic tranquility. This is the office of the criminal justice system. (See Pound, III, *Jurisprudence*; Chapter 4, *Interest*, Section 92 at p. 264, (1959)). The limitations placed upon them by both the Federal and North Carolina Constitutions, are that "cruel and unusual" punishment shall not be afflicted. (See U.S. Constitution, Amendment VIII.) Neither life nor liberty shall be taken except by due process of law; nor shall any person be denied equal protection of the law. (See U.S. Constitution, Amendments V, VIII, XIV, and Article I, Sections 19, 22 and 27, North Carolina Constitution.) Operating within these limitations, it is State Legislatures' inherent and exclusive duty and it has the

correlative right to define crime and provide for the punishment of crimes committed. (See *Ex Parte U.S.*, 242 U.S. 27 (1916); *State v. Brewer*, 258 N.C. 533, 129 S.E. 2d 262 (1963) app. dismd., 375 U.S. 9 (1963); *Lawton v. Steele*, 119 N.Y. 226, 23 N.E. 878 (1890), aff'd. 152 U.S. 133 (1894).

> And it has also been observed that:
>
> "The power is exclusive and it is not shared by the Court. So long as the Constitutional prohibitions are not infringed, the will of the legislature in this respect is absolute."

(See 21 Am. Jur. 2nd *Criminal Law*, Section 14, p.95, citing among others, *Central Lumber Company v. South Dakota*, 226 U.S. 157 (1912), *Coffey v. Harlan County*, 204 U.S. 659 (1907)). It is the duty of the executive to bring to justice those who commit crimes and it is the duty of the judiciary to assure that the accused receives due process and equal protection of the law. Just as the Constitution of the United States contemplates capital punishment, so does the Constitution of North Carolina expressly provide therefor. (See U.S. Constitution, Amendment V.; N.C. Constitution, Article 11, Section 2.)

CONCLUSION

The State of North Carolina, respondent, respectfully requests of this Court that it deny the petitioner's Petition for Writ of Certiorari to the Supreme Court of North Carolina.

This the 11th day of February, 1975.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

Thomas B. Wood

Thomas B. Wood
Assistant Attorney General
N. C. Department of Justice
Post Office Box 25201
Raleigh, North Carolina 27611
Telephone: (919) 829-3316

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is an Assistant Attorney General licensed to practice law in the State of North Carolina and the United States Supreme Court.

That on February 11, 1975, he served a copy of the attached RESPONSE OF THE STATE OF NORTH CAROLINA TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA to the person hereinafter named, at the place and address stated below by depositing said envelope and its content in the United States mail at Raleigh, North Carolina:

Address: Norman B. Smith
SMITH, CARRINGTON, PATTERSON, FOLLIN & CURTIS Attorneys at Law 704 Southeastern Building Greensboro, North Carolina 27401

Signed: Thomas B. Wood

Thomas B. Wood
Assistant Attorney General
N. C. Department of Justice
Post Office Box 25201
Raleigh, North Carolina 27611
Telephone: (919) 829-3316